IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.707 OF 2006

In

NOTICE OF MOTION NO.3733 OF 2003

In

SUIT NO.286 OF 1981

Bennett Coleman & Co. Ltd. & Anr. : Appellants

(Orig.Defendants 1 & 4)

V/s.

Jamshed Kawasjee Vakeel & Ors. : Respondents

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Dr.Virendra Tulzapurkar, senior counsel, with Mr.Sandip Parekh i/b. M/s.Kanga & Co., for the appellants.

Mr.Devansh Mehta i/b. Mr.Vinod Juwale for the respondents.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATE : OCTOBER 3, 2006.

ORAL ORDER (Per R.M.Lodha, J.)

1. The defendants are in appeal, dissatisfied with the order dated 7.8.2006. By the said order, the learned Motion Judge restored the suit which was dismissed in default on 9.10.2003.

2. The counsel for the respondents (original plaintiffs)

raised a preliminary objection about the maintainability of the appeal. Relying upon the Division Bench judgement of the Calcutta High Court in the case of Tulsiram Bhagwandas v. Sitaram Srigopal (AIR 1959 Calcutta 389), the counsel for the respondents urged that an order restoring the suit made under Order IX Rule 9 of the C.P.C. is not a 'judgement' and, therefore, not appealable under Clause 15 of the Letters Patent.

3. In the case of Tulsiram Bhagwandas, the Division Bench of the Calcutta High Court held thus:-

> "(22) It may, however, be said, although it was not so contended at the Bar, that the decision in ILR 49 Cal. 616: (AIR 1922 Cal. 407) cannot govern the present case, because there was no dismissal for default, but a decision on the evidence, as I have found. The decision, it may be said, would apply only to an order properly made under Or. 9, R. 9, but not to an order where the Judge wrongly purports to proceed under that rule, although the decree, being a decree on the merits, it could have no application. I concede that the decision would not strictly apply, because we cannot find a decree to be a decree on the evidence and thus exclude the application of Or. 9, R. 9 to an order setting aside the decree and, at the same time, treat that very order as an order made under R. 9 of Or. 9 for the purpose of excluding an appeal. Yet, I think the principle of the decision in ILR 49 Cal. 616: (AIR 1922 Cal. 407) clearly applies to the present case. The reason why an order made under R. 9 of Or. 9 is not appealable is that it is not a judgment and the reason why it is not a judgment is that it merely sets aside the decree passed and restores the suit, but decides nothing. The order in the

> present case, though it cannot be said to be an order under R. 9 Or. 9, is yet an order merely setting aside the decree and restoring the suit for further hearing. This order also decides nothing and therefore the principle which bars an appeal from an order made under R. 9 of Or. 9 applies equally to this order and equally bars an appeal. I am accordingly of the opinion that the respondent's contention that no appeal lies from the order of G.K. Mitter J. must be upheld and I may add that although I have held in the respondent's favour on the correctness of the learned Judge's order, I do not feel any particular regret in coming to the conclusion that no appeal lies, because all that has been given to the respondent is a chance to prove its case and the appellant has been weel (sic) compensated by costs."

4. In the case of Tulsiram Bhagwandas, it has, thus, been held that an order of restoration of the suit made under Order IX Rule 9 decides nothing and, therefore, not a judgement.

5. Dr.Virendra Tulzapurkar, senior counsel for the appellants, in response to the preliminary objection raised by the counsel for the respondents, submitted that in the facts of the present case, the judgement of the Calcutta High Court in the case of Tulsiram Bhagwandas is not applicable. He would submit that in the present case, the legal position exposited by the Calcutta High Court in the case of S.C. Sons (P) Ltd. v. Brahma Devi (AIR 1986 Calcutta 437) is attracted.

6. As to how the judgement of the Calcutta High Court in the case of S.C. Sons (P) Ltd. is applicable to the present case, the senior counsel, submitted that the suit was initially dismissed for want of appearance on 22.11.2002. However, it was restored on 13.12.2002. Then again the suit came to be dismissed in default on 9.10.2003. The application for restoration was not made in time. The application, according to Dr.Virendra Tulzapurkar, for restoration was made on 16.12.2003 and since it was barred by time, the application for condonation of delay in filing the appeal belatedly was made. The senior counsel submitted that where the suit is restored, in spite of the fact that the application for restoration is barred by limitation, such order amounts to 'judgement' within the meaning of Clause 15 of the Letters Patent.

7. In the case of S.C. Sons (P) Ltd., the Division Bench of the Calcutta High Court referred to its various earlier decisions and the judgement of the Supreme Court in the case of Shah Babulal Khimji v. Jayaben D. Kania (AIR 1981 SC 1786). In para 74 and 75 of the report, the Division Bench of the Calcutta High Court ruled thus:-

> "74. Apart from the decisions of the Calcutta High Court referred to above, in view of the principles laid down by Supreme Court in Shah Dabulal Khimji v. Jayaben D.

> Kania AIR 1981 SC 1786 (supra), in our opinion, an order allowing an application for setting aside a suit dismissed for non-prosecution does not satisfy the test of finality as laid down therein.
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> 75. However, in our opinion, there is an exception to the same. When in such a case the question of limitation is involved and when such application is allowed and the suit is restored in spite of the fact that the same is barred by limitation, in our opinion that is a "Judgment" within the meaning of Cl. 15 of the Letters Patent. This in our opinion follows from the decision of the Supreme Court itself. If such application has become time-barred, a valuable right is conferred on the defendant. If in such a case, in spite of such application being time-barred, it is allowed and the suit is restored, then in our opinion such an order is a "judgment" within the meaning of Cl. 15 of the Letters Patent because it takes away a valuable right conferred on the defendant. However as in the present case we have held that such application was not barred by limitation, accordingly in our opinion the general principle applies and the order allowing such application is not a "judgment" within the meaning of Cl. 15."

8. We are in respectful agreement with the view of the Calcutta High Court that where a suit is restored in spite of the fact that the application for restoration is barred by limitation, such order amounts to a ‘judgement’ under Clause 15 of the Letters Patent and thereby appealable. It is so because by not making an application for restoration within limitation prescribed for it, a valuable right is created in favour of the defendant. Upon condonation of delay and restoration of the suit after the expiry of the limitation, surely, the

valuable right of the defendant is affected. Such order affecting the valuable right of the defendant is a 'judgement' within the meaning of Clause 15 of Letters Patent. The judgement of the Calcutta High Court in Tulsiram Bhagwandas is applicable where an order of restoration of the suit is made on the application made within limitation prescribed for it. As already noticed above, the suit was dismissed in default on 9.10.2003. The application for restoration of the suit was made on 16.12.2003 i.e. beyond the period of limitation. It is, thus, clear that the suit has been ordered to be restored by the learned single Judge, in spite of the fact that the application for restoration of the suit was barred by limitation. Such an order for restoration is appealable for the reasons indicated above.

9. We, therefore, hold that in the facts and circumstances of the present case, it cannot be said that the impugned order is not a 'judgement' within the meaning of Clause 15 of the Letters Patent. The preliminary objection raised by the counsel for the respondents about the maintainability of the appeal is over-ruled.

10. Though the appeal has been held to be maintainable by us, we find that the appeal has no merit and does not

deserve to be admitted. In the affidavit-in-support of the Notice of Motion dated 16.12.2003 seeking restoration of the suit, inter alia, it is stated that due to business proposal, the 1st plaintiff had to leave India on 8.10.2003 and could not remain present nor instruct anybody to remain present on his behalf on 9.10.2003. Where the party is able to show sufficiency of the cause for his non-appearance on the date fixed, such cause furnishes good ground for restoration and it is not necessary for the plaintiff to explain the reason for non-appearance of his Advocate on the said date.

11. We are thus satisfied that the learned Motion judge did not commit any error in condoning the delay in making the application for restoration of the suit and, consequently, restoring the suit.

12. No case for interference is made out.

13. Appeal is dismissed.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.